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No. 08-1134

SUPREME COURT, U.S.
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In The
Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

FRANCISCO J. ESPINOSA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Student loans are statutorily nondischargeable in bankruptcy unless repayment would cause the debtor an "undue hardship." Debtor failed to prove undue hardship in an adversary proceeding as required by the Bankruptcy Code and Rules, and instead, merely declared a discharge in his Chapter 13 plan. Are the orders confirming the plan and discharging debtor void?

2. Bankruptcy Rules permit discharge of a student loan only through an adversary proceeding, commenced by filing a complaint and serving it and a summons on an appropriate agent of the creditor. Instead, debtor merely included a declaration of discharge in his Chapter 13 plan and mailed it to creditor's post office box. Does such procedure meet the rigorous demands of due process and entitle the resulting orders to respect under principles of *res judicata*?

RULE 29.6 STATEMENT

Petitioner United Student Aid Funds, Inc. is a private nonprofit corporation established under the laws of the State of Delaware. It has no parent company, and no publicly held company holds any membership interest in it. Its members are the individuals on its Board of Trustees.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT	2
Espinosa's bankruptcy petition	2
Notice to creditors	3
Espinosa's plan	4
Notice of the plan	5
Objections to the plan	6
USA Funds' claim	7
Confirmation of the plan	7
Espinosa's discharge	8
Post-discharge proceedings	9
SUMMARY OF ARGUMENT	11
ARGUMENT	16
I. Student loan debt is not dischargeable in bankruptcy absent a showing of undue hardship in an adversary proceeding	16

TABLE OF CONTENTS – Continued

Page

A. The text of the Bankruptcy Code makes clear that student loans are nondischargeable without a finding of undue hardship 17

B. Congress has repeatedly amended the Bankruptcy Code to restrict the dischargeability of student loan debt 20

C. Discharge by declaration nullifies the statutory presumption that the exception to discharge of student loan debts is self-executing 23

II. A debtor's failure to prove undue hardship in an adversary proceeding nullifies the plan confirmation and discharge of the debt 25

A. By express statutory restriction, only plans that comply with the Bankruptcy Code may be approved 27

B. Orders that purport to discharge student loan debt without a finding of undue hardship in an adversary proceeding are void to the extent of noncompliance 31

C. Failure to object to a plan does not nullify the self-executing nature of exceptions from discharge 33

TABLE OF CONTENTS – Continued

Page

D. Confirmation and discharge orders entered with no determination of undue hardship are not *res judicata* as to the student loan creditor 36

1. The elements of *res judicata* are not satisfied 37

2. The Bankruptcy Code's general finality provision does not apply to plan provisions that are contrary to law 40

III. There are sound policy reasons why Congress required an adversary proceeding to establish undue hardship before student loan debt may be discharged 43

A. If the Ninth Circuit's approach were adopted nationwide, it would apply to all statutory exceptions to discharge 43

B. Requiring creditors to raise *pro forma* objections to preserve the statutory exceptions would yield no meaningful benefits while imposing significant dead-weight losses 48

IV. Due process requires the heightened notice afforded student loan creditors in adversary proceedings 51

CONCLUSION 58

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Associates Commercial Corp. v. *Rash*,
520 U.S. 953 (1997) 29

Andersen v. *UNIPAC-NEBHELP*,
179 F.3d 1253 (10th Cir. 1999) 24

Banks v. *Sallie Mae Servicing Corp.*,
299 F.3d 296 (4th Cir. 2002) 52, 53, 57

Bruning v. *United States*,
376 U.S. 358 (1964) 18, 47

Cen-Pen Corp. v. *Hanson*,
58 F.3d 89 (4th Cir. 1995) 38

City of New York v. *New York, New Haven & Hartford R.R.*,
344 U.S. 293 (1953) 54, 56, 57

Corley v. *United States*,
129 S. Ct. 1558 (2009) 29, 41

Cumberland Glass Mfg. Co. v. *DeWitt*,
237 U.S. 447 (1915) 37

Digital Equip. Corp. v. *Desktop Direct, Inc.*,
511 U.S. 863 (1994) 29

Educational Credit Mgmt. Corp. v. *Mersmann*,
505 F.3d 1033
(10th Cir. 2007) 24, 25, 32, 38, 41, 53, 58

Federal Trade Comm'n v. *Minneapolis-Honeywell Regulator Co.*,
344 U.S. 206 (1952) 42

TABLE OF AUTHORITIES – Continued

Page

Great American Trading Corp. v. *I.C.P. Cocoa, Inc.*, 629 F.2d 1282 (7th Cir. 1980) 32, 33

Great Lakes Higher Educ. Corp. v. *Pardee*, 193 F.3d 1083 (9th Cir. 1999) 10, 45

Grogan v. *Garner*, 498 U.S. 279 (1991).....19

Grynberg v. *United States*, 986 F.2d 367 (10th Cir. 1993) 7

Harrah Ind. Sch. Dist. v. *Martin*, 440 U.S. 194 (1979).....54

In re Beard, 112 B.R. 951 (Bankr. N.D. Ind. 1990).....38

In re Bishop, 13 B.R. 304 (Bankr. E.D.N.Y. 1981) 47

In re Brunner, 831 F.2d 395 (2d Cir. 1987).....26

In re Enewally, 368 F.3d 1165 (9th Cir. 2004).....38

In re Escobedo, 28 F.3d 34 (7th Cir. 1994) 32, 38

In re Fizer, 1 B.R. 400 (Bankr. S.D. Ohio 1979).....30

In re Hanson, 397 F.3d 482 (7th Cir. 2005).....24, 25, 32, 52

In re Hudson, 859 F.2d 1418 (9th Cir. 1988) 47

TABLE OF AUTHORITIES – Continued

Page

In re Mansaray-Ruffin,
530 F.3d 230 (3d Cir. 2008) 28, 34, 41, 55, 58

In re McKay,
732 F.2d 44 (3d Cir. 1984) 27, 28

In re Robinson,
225 B.R. 228 (Bankr. N.D. Okla. 1998) 30

In re Sargis,
197 B.R. 681 (Bankr. D. Colo. 1996) 46

Johnson v. *Home State Bank*,
501 U.S. 78 (1991) 29

Kelly v. *Robinson*,
479 U.S. 36 (1986) 17

Matter of Bell,
189 B.R. 543 (Bankr. N.D. Ga. 1995) 47

Montana v. *United States*,
440 U.S. 147 (1979) 37, 38

Morales v. *Trans World Airlines, Inc.*,
504 U.S. 374 (1992) 41

Mullane v. *Central Hanover Bank & Trust*,
339 U.S. 306 (1950) 54, 56

Pepper v. *Litton*,
308 U.S. 295 (1939) 36

Piedmont Trust Bank v. *Linkous*,
990 F.2d 160 (4th Cir. 1993) 39

Richmond v. *New Hampshire Supreme Court Comm. on Prof'l Conduct*,
542 F.3d 913 (1st Cir. 2008) 47

TABLE OF AUTHORITIES – Continued

Page

Rifino v. *United States*,
245 F.3d 1083 (9th Cir. 2001) 26

Ruehle v. *Educational Credit Mgmt. Corp.*,
412 F.3d 679 (6th Cir. 2005) 39, 40, 53, 57, 58

Tennessee Student Assistance Corp. v. *Hood*,
541 U.S. 440 (2004)
..... 18, 21, 23, 24, 25, 26, 33, 37, 51, 52, 53, 56

United States ex rel. Wilson v. *Walker*,
109 U.S. 258 (1883).....31

United Student Aid Funds, Inc. v. *Pena*,
155 F.3d 1108 (9th Cir. 1998).....26

Vallely v. *Northern Fire & Marine Ins. Co.*,
254 U.S. 348 (1920).....31

Wachovia Dealer Services v. *Jones*,
530 F.3d 1284 (10th Cir. 2008) 29, 30

Whelton v. *Educational Credit Mgmt. Corp.*,
432 F.3d 150 (2d Cir. 2005).....32, 38, 41

Wilcox v. *Jackson*,
38 U.S. 498 (1839).....31

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. CONST. art. I, § 8, cl. 4.....18

U.S. CONST. amend. V.....1

U.S. CONST. amend. XIV, § 1 53

11 U.S.C. § 102(1)(A) 1, 55

11 U.S.C. § 105(a) 6

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 362 3
11 U.S.C. § 502(a) 7
11 U.S.C. § 523 ..... 1, 12, 17, 21, 23, 31, 43
11 U.S.C. § 1321 4
11 U.S.C. § 1322 ..... 1, 4, 13, 27, 28, 29, 32
11 U.S.C. § 1324 6
11 U.S.C. § 1325 ..... 1, 6, 7, 13, 29, 30, 31
11 U.S.C. § 1327(a) 2, 40, 41, 42
11 U.S.C. § 1328 ..... 2, 4, 12, 16, 17, 20, 22, 41, 43
20 U.S.C. §§ 1071 – 1084-4 20
20 U.S.C. § 1087-3 (1976 ed.) 21
20 U.S.C. § 1091a 36
20 U.S.C. § 1095a 35
28 U.S.C. § 1254(1) 1
28 U.S.C. § 2075 52
31 U.S.C. § 3716 36
31 U.S.C. § 3720A 36
Pub. L. 96-95, § 3 (1979) 22
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220 (2005) 23, 28
Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 454(a)(2) (1984) 22

TABLE OF AUTHORITIES – Continued

Page

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598 (1978) 21, 22

Educational Amendments of 1976, Pub. L. No. 94-482, § 439A(a) (1976) 21

Federal Debt Collection Procedures Act of 1990, Pub. L. No. 101-647, § 3612(2) (1990) 22

Higher Education Act of 1965, Pub. L. No. 89-329 (1965) 20

Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a) (1998) 23

National Defense Act of 1958, Pub. L. No. 85-864, Title II, §§ 201-09 (1958) 20

Student Loan Default Prevention Initiative Act of 1990, Pub. L. No. 101-508, § 3007 (1990) 22

FED. R. BANKR. P. 1007(a) 5

FED. R. BANKR. P. 2002 ..... 3, 39, 53

FED. R. BANKR. P. 3001(f) 7

FED. R. BANKR. P. 3015 ..... 4, 5, 6, 52

FED. R. BANKR. P. 7001 ..... 5, 12, 26, 34, 52

FED. R. BANKR. P. 7003 ..... 5, 13, 34, 39, 52

FED. R. BANKR. P. 7004 ..... 5, 13, 34, 39, 52

FED. R. BANKR. P. 7008 53

FED. R. CIV. P. 3 52

FED. R. CIV. P. 8 53

FED. R. CIV. P. 60(b)(4) 9, 13, 31, 32, 36

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

ADMIN. OFFICE OF THE U.S. COURTS News Release, BANKRUPTCY FILINGS UP IN CALENDAR YEAR 2008 (Mar. 5, 2009) www.uscourts.gov/Press_Releases/2009/BankruptcyFilingsDec2008.cfm 49

11 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2862 (2d ed. 1995) 36

2 COLLIER ON BANKRUPTCY ¶ 102.02[1] (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. rev. 2009) 21, 55

2 COLLIER ON BANKRUPTCY ¶ 102.02[3] 55

3 COLLIER ON BANKRUPTCY ¶ 341.02[2] 3

4 COLLIER ON BANKRUPTCY ¶ 523.14[1] 20

4 COLLIER ON BANKRUPTCY ¶ 523.14[2] 26

4 COLLIER ON BANKRUPTCY ¶ 523.26(1) 44

8 COLLIER ON BANKRUPTCY ¶ 1322.01 2

10 COLLIER ON BANKRUPTCY ¶ 7001.01 25

CHARLES J. TABB, THE LAW OF BANKRUPTCY 895 (1997) 2

H.R. Doc. No. 93-137, pts. I & II (1973) 21

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TABLE OF AUTHORITIES – Continued

Page

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S. Rep. No. 95-989, p. 79 (1978) 23

TRENDS IN STUDENT AID 2008, COLLEGE BOARD, October 2008, http://professionals.collegeboard.com/profdownload/trends-in-student-aid-2008.pdf 49

U.S. DEPT. OF EDUC., FINANCIAL AND PERFORMANCE QUARTERLY UPDATE, Issue 2008-2 (Sept. 30, 2008) 48

OPINIONS BELOW

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JURISDICTION

The judgment of the court of appeals was entered on October 2, 2008. The judgment was amended and a petition for rehearing was denied on December 10, 2008. The petition for a writ of certiorari was filed on March 10, 2009 and granted on June 15, 2009. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "No person shall * * * be deprived of life, liberty, or property, without due process of law."

11 U.S.C. § 102. Rules of construction.

11 U.S.C. § 523. Exceptions to discharge.

11 U.S.C. § 1322. Contents of plan.

11 U.S.C. § 1325. Confirmation of plan.

11 U.S.C. § 1327. Effect of confirmation.

11 U.S.C. § 1328. Discharge.

See Appendix, *infra*, for pertinent text of statutes.

STATEMENT

Espinosa's Bankruptcy Petition

In 1988, respondent Francisco J. Espinosa obtained four student loans totaling $13,250. J.A. 16. The loans were made through the Federal Family Education Loan Program ("FFEL Program") and were guaranteed by the federal government.

In December 1992, Espinosa filed a Chapter 13 bankruptcy petition. J.A. 5. Chapter 13 facilitates the adjustment of the debts of an individual with regular income through a repayment plan funded from future income. 8 COLLIER ON BANKRUPTCY ¶ 1322.01, p. 1322-6 (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. rev. 2009) (hereinafter "COLLIER'S"). Chapter 13 is "intended * * * [t]o function as the primary rehabilitation chapter for individual consumer debtors." CHARLES J. TABB, THE LAW OF BANKRUPTCY 895 (1997).

The schedules to Espinosa's bankruptcy petition listed as his only debts his student loans totaling $13,250. J.A. 7, 15-16. At the time of filing, Espinosa's notes were held by petitioner United Student Aid Funds, Inc. ("USA Funds") as guarantor because the loans were in default. Bankr. Dkt. 31 at 2 & 32 at 2; Dist. Dkt. 5 at 3, 6. USA Funds is the largest

educational loan guaranty agency under the FFEL Program.[1]

Notice to Creditors

The bankruptcy petition and its schedules are not sent to creditors. Instead, creditors receive a separate notice of the filing of the bankruptcy case. The Bankruptcy Code requires notice of the "order for relief," which is the stay order that is automatically entered upon filing of the bankruptcy petition. 11 U.S.C. § 362. "In a voluntary case commenced by an individual debtor whose debts are primarily consumer debts, the clerk * * * give[s] notice by mail of the order for relief within 20 days." FED. R. BANKR. P. 2002(o). The notice is normally given through the mailing of the appropriate version of Official Bankruptcy Form 9, which also includes notice of the first meeting of creditors, certain deadlines, and other case information. That form "is often the first notice that most creditors receive that a bankruptcy case has been filed." 3 COLLIER'S ¶ 341.02[2], pp. 341-7.

That form notice was mailed in this case. Bankr. Dkt. 5; J.A. 34. With regard to the bankruptcy petition and its schedules, it stated: "You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court." *Ibid.*

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[1] http://www.finaid.org/loans/guaranteeagencies.phtml.

Espinosa's Plan

A Chapter 13 debtor is required to file a "plan" either with the bankruptcy petition or shortly thereafter. 11 U.S.C. § 1321; FED. R. BANKR. P. 3015(b). The plan proposes the amounts of the monthly payments that the debtor will make to the trustee, which creditors will be paid, how much they will be paid, and over what period of time payments will be made. See 11 U.S.C. § 1322. There is no official form for a plan. Some elements of the plan are required by statute. 11 U.S.C. § 1322(a). Other content is permitted to the extent "not inconsistent with this title." *Id.* § 1322(b)(11).

Espinosa's plan, filed at the same time as his bankruptcy petition, classified his student loan debts as unsecured priority claims and provided for payment of only the principal amount of his loans ($13,250) over the maximum allowable period of sixty months. J.A. 23, 26, 31-32. The plan declared that "[a]ny amounts or claims for student loans unpaid by this Plan shall be discharged." J.A. 26. In other words, according to the plan, all accrued and post-petition interest would be discharged.

Student loans are, by statute, nondischargeable except in demonstrated circumstances of "undue hardship." 11 U.S.C. § 1328(a)(2 Espinosa's plan did not assert that he would suffer undue hardship if the interest on his student loans were not discharged. Instead, his plan simply declared a discharge.

To determine whether a presumptively nondischargeable debt may be discharged, the Bankruptcy Rules require a separate action termed an adversary proceeding. FED. R. BANKR. P. 7001(6). An adversary proceeding is commenced by filing a complaint. FED. R. BANKR. P. 7003. Notice is given by serving the complaint with a summons. FED. R. BANKR. P. 7004. In this case, Espinosa did not file a complaint seeking a determination that paying his student loan debt would cause him undue hardship.

Notice of the Plan

The Bankruptcy Rules require that either the plan or a summary of it be mailed to creditors along with the notice of the hearing to confirm the plan. FED. R. BANKR. P. 3015(d). The mailing addresses used by the clerk are those on a list provided by the debtor. FED. R. BANKR. P. 1007(a). The address provided for USA Funds by Espinosa was the post office box address used to receive loan payments. Bankr. Dkt. 2.

A copy of Espinosa's plan was mailed to (and received by) USA Funds at that address. J.A. 34. Espinosa did not serve the plan on an officer of USA Funds, a managing or general agent, or other agent authorized to receive service of process. Bankr. Dkt. 32 at 3; Dist. Dkt. 5 at 3. A summons and complaint in an adversary proceeding against a corporation like USA Funds must be so served. FED. R. BANKR. P. 7004(b)(3).

Objections to the Plan

After a Chapter 13 plan is submitted, creditors may object to its confirmation. 11 U.S.C. § 1324. The trustee also has the right to object. *Id.* § 1325. The court may also object to prevent an abuse of process. *Id.* § 105(a).

Objections to confirmation of a plan must be filed before the plan is confirmed. FED. R. BANKR. P. 3015(f). Espinosa's plan provided that any creditor's objections must be filed seven days before the confirmation hearing, J.A. 26, thus purporting to impose an affirmative duty on creditors to object. USA Funds filed no objection.[2]

The trustee did file an objection, asserting that Espinosa had misclassified his student loan debts as priority claims, and requesting that the plan be amended to reclassify the debt. J.A. 37-38. Espinosa amended his schedules to list his student loans as "unsecured nonpriority claims." J.A. 39. The amendment stated that the reclassification would "not affect the obligation for the student loan which shall be paid 100% through the Debtor's Plan." *Ibid.*

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[2] Because the plan reflected that all of Espinosa's disposable income would be applied to his student loan debt for the statutory maximum plan duration of sixty months, J.A. 22, 32, USA Funds could not have obtained any greater plan payment by objecting to the plan.

USA Funds' Claim

A holder of a nondischargeable debt is not required to file a claim in the debtor's bankruptcy case. *Grynberg* v. *United States* (*In re Grynberg*), 986 F.2d 367, 370 (10th Cir. 1993). The creditor may either file a claim or choose to wait until the conclusion of the bankruptcy proceeding to bring suit on its claim in another forum. *Ibid.*

USA Funds filed a proof of claim for $17,832 as an unsecured non-priority claim. J.A. 35-36. That amount included pre-petition interest. *Ibid.* Neither the trustee nor Espinosa objected to the claim. A claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a); FED. R. BANKR. P 3001(f).

Confirmation of the Plan

Whether or not any objection is made, the bankruptcy court is required to evaluate the plan under the standards of 11 U.S.C. § 1325. If the plan complies, and the court determines it is feasible for the debtor to complete it, the plan will be confirmed. *Ibid.*

At Espinosa's plan confirmation hearing, he did not prove or attempt to prove the requisite elements of undue hardship, and there was no determination by the bankruptcy court of undue hardship. J.A. 41. In the absence of any objection, the court entered an order confirming the plan. J.A. 42-43. The confirmation order made no finding of undue hardship.

After the plan was confirmed, the trustee gave notice to USA Funds that its claim, which differed in amount from that listed for payment in the plan, would be paid according to the plan. The notice further stated that the claim would be "treated as indicated" unless the trustee received a request within 30 days for different treatment. J.A. 44-45. USA Funds made no such request.

Espinosa's Discharge

Espinosa paid his only obligation under the plan, and a standard discharge order was entered on May 30, 1997 that both specifically and generally excepted his student loans from discharge:

> 1. [T]he debtor(s) are discharged from all debts provided for by the plan * * * except any debt * * *
>
> (c) for a student loan * * * as specified in 11 U.S.C. § 523(a)(8) * * * *
>
> 3. Notwithstanding the provisions of Title 11, United States Code, the debtor(s) are not discharged from any debt made nondischargeable by * * * any * * * applicable provision of law.

J.A. 46-47. The discharge order enjoined creditors from taking action to collect any discharged debt. J.A. 47.

Although the discharge order expressly excepted Espinosa's student loan debts from discharge, he did not move to correct the order or appeal from it.

Post-Discharge Proceedings

Espinosa's loans were subrogated to the U.S. Department of Education under a reinsurance agreement with USA Funds. Bankr. Dkt. 32 at 4; Dist. Dkt. 5 at 6. In 2000, the Department of Education began collection efforts and caused the Treasury Department to intercept Espinosa's federal income tax refunds. Bankr. Dkt. 26 at 2; 28 at 4. In 2003, Espinosa filed motions in the bankruptcy court seeking to reopen the case and alleging that the discharge injunction had been violated. Bankr. Dkt. 26, 29.

In 2004, USA Funds recalled the loans from the Department of Education, Dist. Dkt. 5 at 6, and moved under Federal Rule of Civil Procedure 60(b)(4) for relief from the confirmation order on the ground that it is void. Bankr. Dkt. 32. The bankruptcy court ruled for Espinosa. Pet. App. 71. USA Funds appealed to the district court, which reversed, ruling that the confirmation order was void for lack of due process and therefore had no *res judicata* effect. Pet. App. 60.

A panel of the Ninth Circuit remanded to the bankruptcy court for a determination whether the exclusion of Espinosa's student loan debt from the discharge order was a clerical error. Pet. App. 51. The bankruptcy court ruled that it was and entered an order discharging the balance of Espinosa's student

loan debt – still without making any determination of undue hardship. J.A. 48.

The Ninth Circuit then reversed the district court. Pet. App. 28. The court first held that USA Funds' statutory argument – that the plain text of the Bankruptcy Code and Rules precludes discharging student loan debt – was "foreclosed" by Ninth Circuit precedent that was "on all fours" with this case. Pet. App. 32-41 (citing *Great Lakes Higher Educ. Corp.* v. *Pardee* (*In re Pardee*), 193 F.3d 1083, 1086 (9th Cir. 1999) (holding that a debtor may discharge a student loan merely by including it in a Chapter 13 plan, without commencing an adversary proceeding and without proving or even alleging undue hardship)).

Bound by its prior ruling in *Pardee*, the court of appeals dismissed the statutory argument and turned next to the constitutional argument. Reversing the district court, the panel concluded that due process does not require compliance with the congressionally mandated procedures for discharging student loan debts, namely proof of undue hardship through an adversary proceeding. Pet. App. 41-48.

The Ninth Circuit therefore held that the order confirming Espinosa's plan was valid and final, and that his remaining student loan debt was discharged by the amended discharge order. Pet. App. 48-49.

In a concluding dictum, the panel admonished all future bankruptcy courts in the Ninth Circuit that courts "*have no business standing in the way*" by refusing to "confirm plans that seek to discharge

student loan debts without an adversary proceeding, even when the creditor fails to object to the plan." Pet. App. 48-49 (emphasis added).

After USA Funds filed a petition for rehearing, the court of appeals panel amended its opinion. The court of appeals denied en banc review. Pet. App. 1.

SUMMARY OF ARGUMENT

In 1958, in an effort to expand post-secondary educational opportunity to as many Americans as possible, Congress established the first federally sponsored student loan program. In the fifty-one years since, Congress has repeatedly expanded the availability of federally guaranteed student loans, resulting in an historic increase in college attendance for students who could not otherwise afford higher education.

Hand-in-hand with that expansion of federally guaranteed student loans, Congress has over and over again narrowed the circumstances under which those loans can be discharged in bankruptcy. Recognizing that abuse of the bankruptcy process drives up the costs for all student borrowers – and for the taxpayers guaranteeing those loans – Congress has mandated that student loans can be discharged only upon a demonstration of "undue hardship," which, under the Bankruptcy Rules, can be made only through an "adversary proceeding" where the debtor bears the burden of proof.

Notwithstanding that congressional mandate, in the instant case, the Ninth Circuit approved a different means of discharging student loan debt: what is known as "discharge by declaration." According to the Ninth Circuit, a debtor may simply list student loan debts in his or her Chapter 13 bankruptcy plan, and, if the creditor fails to affirmatively object, the bankruptcy court must confirm the plan and, upon completion of its terms, discharge the debt.

The Ninth Circuit rule is in direct contravention of the plain text of both the Bankruptcy Code and the Bankruptcy Rules. Moreover, if judicially approved, discharge by declaration would frustrate the expressed will of Congress and would facilitate the discharge of a host of debts that Congress has deemed nondischargeable. And it would impose dramatic burdens on litigants and the judicial system, with no countervailing benefits.

Congress has expressly exempted student loans from discharge in bankruptcy. 11 U.S.C. § 1328(a)(2). Equally unequivocal is the sole statutory exception to this rule: student loan debt is nondischargeable "unless excepting such debt from discharge * * * would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8).

The Bankruptcy Rules, in turn, provide that "undue hardship" may be determined only through an "adversary proceeding," which, like a civil lawsuit, must be commenced by the debtor filing a complaint and serving a summons. FED. R. BANKR. P. 7001,

7003-04. The debtor then has the burden of proving "undue hardship" in the adversary proceeding to rebut the presumption of nondischargeability.

Discharge by declaration – allowing the discharge of student loan debt with neither an adversary proceeding nor a judicial finding of "undue hardship" – is irreconcilable with the plain text of the Bankruptcy Code and Rules.

Indeed, Congress has further prohibited the inclusion of discharge by declaration provisions in plans by expressly prohibiting any provisions that are inconsistent with the Bankruptcy Code. 11 U.S.C. § 1322(b)(11). Moreover, Congress also forbids courts from confirming plans that do not comply with the Bankruptcy Code. 11 U.S.C. § 1325(a). Consequently, an order confirming a plan that purports to discharge a student loan by mere declaration, and the subsequent discharge order, are doubly beyond the court's authority and therefore void in that regard.

Because the exception of student loans from discharge is self-executing, a creditor has no duty to object to a plan proposing a discharge by declaration. Instead, the creditor is entitled to wait for the debtor to bring the required adversary proceeding.

If a court confirms a discharge by declaration plan and thereafter discharges a student loan without an adjudication of undue hardship, such orders are not final and binding on the creditor. Being void orders, *res judicata* does not bar a direct attack by a Rule 60(b)(4) motion. Furthermore, *res judicata* has

no application because the issue of undue hardship was never adjudicated on the merits and the creditor was never given the requisite full and fair opportunity to litigate the issue by adversary proceeding.

The Ninth Circuit ruled to the contrary because it refused to accord force to the congressional mandate once the discharge by declaration had been memorialized in a confirmation order. But that reasoning proves too much. If the Ninth Circuit's analysis is correct, it would apply not just to student loans, but also to all of the other types of debts that Congress has also deemed nondischargeable, including state and federal taxes, child support, alimony, drunk driving related personal injury and death judgments, and criminal fines and restitution orders. Such an outcome is inconsistent with the text and manifest purpose of the Bankruptcy Code.

And it would accomplish no meaningful purpose. If the Ninth Circuit rule were adopted nationwide, attempts at discharge by declaration for all these nondischargeable debts would predictably become commonplace. Some creditors – for example, some recipients of alimony or child support or some victims of drunk driving accidents – would no doubt be caught unawares, and inadvertently lose the protection granted by Congress. And other more sophisticated creditors – such as large student loan guarantors and lenders and state and federal government agencies – would no doubt have to expand their efforts to review in detail every bankruptcy plan

and to interpose *pro forma* objections in countless proceedings to protect their rights.

Once those objections were made, all of them – 100 percent – would be sustained because discharge by declaration is contrary to the plain text of the Bankruptcy Code. So, the necessary result of the Ninth Circuit's rule with respect to student loans, if approved, would be (1) the expenditure of substantial sums on lawyers throughout the nation, (2) the resultant higher costs for student loan agencies, which costs would ultimately be borne by student loan borrowers or the taxpayer, and (3) the additional burden on the judicial system to consider and sustain the deluge of *pro forma* objections to attempted discharges by declaration. These results would be amplified exponentially when the Ninth Circuit's rule is applied to the other nondischargeable debts. And, at the end of that considerable time and effort, the out-come would be – to return to *status quo ante*, if only the text of the statute had been enforced in the first place.

That makes no sense. Congress has determined the necessary predicate for discharging student loans, and courts should give force to that congressional mandate. Demanding that creditors make *pro forma* objections before enforcing the congressional requirements for discharge furthers no purpose in the statute, and only imposes dead-weight losses on the parties and the court system.

Indeed, discharge by declaration is not only inconsistent with the statutes, it is also contrary to the constitutional safeguards of due process. Although Congress could surely have allowed discharge of student loans with lesser procedural protections, once Congress specifies heightened procedural protections, the Constitution prohibits depriving persons of property without the process that is due. Congress specified the process that was due – here, a judicial determination of "undue hardship" in the adversary proceeding required by the Bankruptcy Rules – and discharging a student loan debt with anything less runs afoul of the protections of due process.

ARGUMENT

I. STUDENT LOAN DEBT IS NOT DISCHARGEABLE IN BANKRUPTCY ABSENT A SHOWING OF UNDUE HARDSHIP IN AN ADVERSARY PROCEEDING.

Under Title 11, section 1328(a)(2), student loan debt is nondischargeable in bankruptcy unless repayment would cause the debtor an "undue hardship." Espinosa did not even attempt to prove undue hardship in an adversary proceeding as required by the Bankruptcy Code and Rules and, instead, merely declared a discharge in his Chapter 13 plan. In every other circuit to have considered the issue – other than the Ninth Circuit – orders confirming the plan and discharging the debtor without a judicial finding of undue hardship would have been deemed void. The

text, purpose, and history of the Bankruptcy Code compel that result and require reversal of the court of appeals' contrary conclusion.

A. The Text of the Bankruptcy Code Makes Clear That Student Loans Are Nondischargeable Without a Finding of Undue Hardship.

Interpretation of the Bankruptcy Code begins, as it must, with the text of the statute. *Kelly* v. *Robinson*, 479 U.S. 36, 43 (1986). The plain text of Chapter 13 expressly excludes student loan debt from discharge, thus making it presumptively nondischargeable:

> [A]fter completion by the debtor of all payments under the plan * * * the court shall grant the debtor a discharge of all debts provided for by the plan * * * *except any debt* * * *
>
> > (2) of the kind specified in * * * paragraph * * * (8) * * * of section 523(a).

11 U.S.C. § 1328(a) (emphasis added). Section 523(a)(8), in turn, provides that student loans are nondischargeable "unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents." The presumption created by section 1328(a) that student loans are nondischargeable is thus rebuttable only by proof of "undue hardship."

This Court recognized as much in *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440 (2004). The issue in *Hood* was whether the Bankruptcy Clause gives Congress the authority to abrogate the States' immunity from private suits. *Id.* at 443. Without reaching that issue, the Court upheld the application of the Bankruptcy Code to adversary proceedings initiated by a debtor against a state guaranty agency to determine the dischargeability of a student loan debt. *Id.* at 451.

In the course of its discussion, the Court explained:

> Student loans used to be presumptively discharged in a general discharge. But in 1976, Congress provided a significant benefit to the States by making it more difficult for debtors to discharge student loan debts guaranteed by States. That benefit is currently governed by § 523(a)(8), which provides that student loan debts guaranteed by governmental units are not included in a general discharge order *unless* excepting the debt from the order would impose an "undue hardship" on the debtor.

541 U.S. at 449 (emphasis added).

Student loan debt is therefore "presumptively nondischargeable," *id.* at 450, as is the interest on that debt. *Bruning* v. *United States*, 376 U.S. 358, 360 (1964) ("[I]nterest is considered to be the cost of the use of the amounts owing a creditor and an incentive

to prompt repayment and, thus, an integral part of the continuing debt."). Absent discharge, the debtor remains personally liable for interest on a nondischargeable debt. *Id.* at 363.

Although a central purpose of the Bankruptcy Code is to provide honest debtors with a "fresh start," *Grogan* v. *Garner*, 498 U.S. 279, 286-87 (1991), "[t]he statutory provisions governing nondischargeability reflect a Congressional decision to exclude from the general policy of discharge certain categories of debt * * * * " *Id.* at 287. "Congress evidently concluded that the creditors' interest in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start." *Ibid.*

Confronted with evidence of increasing abuse of the bankruptcy process that threatened the viability of educational loan programs (as well as harm to the public fisc), Congress acted to make student loan debt presumptively nondischargeable. *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 93-137, pt. I at 11, 170, 176-77; pt. II § 4-506(8) & note (1973). As most student loans are guaranteed or insured by the federal government, their improper discharge harms the public interest because unpaid government-guaranteed student loans must ultimately be paid by taxpayers. The proposed 2010 federal budget projects that guaranteed loan

discharge will cost taxpayers more than $1.5 billion during fiscal 2009.[3]

In making student loan debt expressly and presumptively nondischargeable under sections 523 and 1328, Congress sought to accomplish two important purposes: (1) "preventing abuses of the educational loan system by restricting the ability to discharge a student loan shortly after a student's graduation," and (2) "safeguarding the financial integrity of governmental entities and nonprofit institutions that participate in educational loan programs." 4 COLLIER's ¶ 523.14[1], p. 523-101.

B. Congress Has Repeatedly Amended the Bankruptcy Code To Restrict the Dischargeability of Student Loan Debt.

Federally sponsored student loans began with the National Defense Act of 1958, Pub. L. No. 85-864, Title II, §§ 201-09 (1958), which established the Perkins Loan program. The Stafford Loan program, now known as the FFEL Program, was created by the Higher Education Act of 1965, Pub. L. No. 89-329 (1965) codified at 20 U.S.C. §§ 1071 – 1087-4. At their inception, government-backed student loans

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[3] Table, "Selected Program Costs and Offsets," Office of Federal Student Aid, U.S. Department of Education, Budget of U.S. Government for Fiscal 2010, p. 388 (available from http://www.whitehouse.gov/omb/budget/fy2010/assets/edu.pdf).

were fully dischargeable in bankruptcy. *Hood*, 541 U.S. at 449. Thus, graduating students could discharge their unsecured student loans in bankruptcy while enjoying the higher earning power made possible by their education – and the loans used to attain it. Bankruptcy abuse, in effect, converted many student loans into scholarships.

Student loan bankruptcy abuse raised considerable concern in Congress, see, e.g., H.R. Doc. No. 93-137, pts. I & II (1973), reprinted in B. App. COLLIER'S, pt. 4(c), p. 4-432, and over time, Congress has repeatedly amended the Bankruptcy Code so that student loan debt is no longer readily dischargeable in bankruptcy, but is now presumptively nondischargeable.

Congress first acted to curtail abusive discharges of student loans in bankruptcy in 1976. Educational Amendments of 1976, Pub. L. No. 94-482, § 439A(a) (1976) (codified at 20 U.S.C. § 1087-3 (1976 ed.), repealed by Pub. L. No. 95-598, § 317 (1978)). That enactment made federally insured or guaranteed loans nondischargeable in bankruptcy for a period of five years after the loan first became due, unless payment from future earnings would impose an undue hardship on the debtor.

Ever since, Congress has made it progressively more difficult to discharge student loans. When the current Bankruptcy Code was adopted in 1978, section 523(a)(8) continued the prohibition on discharge within the first five years of the repayment period

absent undue hardship, but expanded the previous statute's scope – which had been limited to federally insured or guaranteed loans – to include any debt "to a government unit, or a nonprofit institution of higher education, for an educational loan." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598 (1978).

In the years that followed, amendments to section 523(a)(8) have reflected a clear congressional design to limit the dischargeability of student loans. In 1979, Congress again expanded the types of loans protected from discharge and also eliminated certain reasons for deferring payment. Pub. L. No. 96-56, § 3 (1979). In 1984, Congress deleted the words "of higher education" from the statute so as to extend protection against discharge to any nonprofit institution, not just nonprofit institutions "of higher education." Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 454(a)(2) (1984).

In 1990, more restrictions on discharge were added. The five-year waiting period was extended to seven years. Federal Debt Collection Procedures Act of 1990, Pub. L. No. 101-647, § 3621(2) (1990). And the exception to discharge of student loans was applied for the first time to Chapter 13 cases by incorporating section 523(a)(8) into section 1328(a). Student Loan Default Prevention Initiative Act of 1990, Pub. L. No. 101-508, § 3007 (1990).

In 1998, Congress amended section 523(a)(8) to eliminate the right to discharge student loans based

solely on their age. Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a) (1998). That amendment left undue hardship as the exclusive basis for discharging a student loan. Most recently, Congress acted in 2005 to include student loans funded by for-profit entities among those that are nondischargeable in bankruptcy. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220 (2005).

Over the last 30 years, then, Congress has acted again and again to restrict the ability of debtors to discharge student loan debt. The Bankruptcy Code now allows discharge of student loan debt for one reason, and one reason only – that "excepting such debt from discharge * * * would impose an undue hardship on the debtor." 11 U.S.C. § 523(a)(8).

C. Discharge by Declaration Nullifies the Statutory Presumption That the Exception to Discharge of Student Loan Debts Is Self-Executing.

This Court has recognized that section 523(a)(8)'s exception of student loans from discharge in bankruptcy is "self-executing." *Hood*, 541 U.S. at 450 (citing S. Rep. No. 95-989, p. 79 (1978)). Indeed, the Senate Report cited by the Court explicitly observes,

> Paragraph (8) * * * is *intended to be self-executing* and the lender or institution is *not required to file a complaint* to determine the nondischargeability of any student loan.

(Emphasis added.)

Consequently, "[u]nless the debtor affirmatively secures a hardship determination, the discharge order *will not* include a student loan debt." *Hood*, 541 U.S. at 450 (emphasis added).

Allowing student loan debt to be discharged by mere declaration – without proof of undue hardship through an adversary proceeding – thwarts Congress's intent that the nondischargeability of student loan debts be self-executing. That is true no matter how the declaration is worded. The tactic of discharge by declaration has been deployed by debtors using various formulations. Some debtors have given lip service to the requirement of undue hardship by simply asserting that it exists or deeming it found upon confirmation of the plan. See, e.g., *Andersen* v. *UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253, 1254 (10th Cir. 1999), *overruled by Educational Credit Mgmt. Corp.* v. *Mersmann (In re Mersmann)*, 505 F.3d 1033 (10th Cir. 2007). Other debtors have proposed plans paying a specified or pro rata amount and discharging the balance without any mention of undue hardship. See, e.g., *In re Hanson*, 397 F.3d 482, 485 (7th Cir. 2005).

Espinosa took the latter tack, proposing payment of a specific amount. His plan declaration was two-pronged. He declared that certain amounts claimed were "not provided for in the loan agreement," and that "[a]ny amounts or claims for student loans unpaid by this Plan shall be discharged." His plan made no mention of undue hardship. J.A. 26.

Whatever words are used, mere declaration is no substitute for the proof of undue hardship that Congress requires on the face of the statute. As the Tenth Circuit put it, "[s]imply embedding a 'meaningless incantation of undue hardship' in a confirmation plan falls short of the 'affirmative' action required by Congress and the Supreme Court." *In re Mersmann*, 505 F.3d at 1048 (citing *In re Hanson*, 397 F.3d at 486).

In sum, giving effect to a discharge by declaration in a plan negates the self-executing nature of the exception to discharge of student loans enacted by Congress. Creditors would be stripped of the protection of the automatic exception, and the burden of raising the issue of dischargeability would be shifted from the debtor to the creditor – running directly contrary to the express will of Congress.

II. A DEBTOR'S FAILURE TO PROVE UNDUE HARDSHIP IN AN ADVERSARY PROCEEDING NULLIFIES THE PLAN CONFIRMATION AND DISCHARGE OF THE DEBT.

The Court has recognized that "[t]he current Bankruptcy Rules *require* the debtor to file an 'adversary proceeding' * * * in order to discharge his student loan debt." *Hood*, 541 U.S. at 451 (emphasis added). "Adversary proceedings are separate lawsuits within the context of a particular bankruptcy case * * * * " 10 COLLIER'S ¶ 7001.01, p. 7001-3. Federal

Bankruptcy Rule of Procedure 7001 lists ten separate categories of proceedings denominated as adversary proceedings, including "a proceeding to determine the dischargeability of a debt." Thus, proof of undue hardship must be made in an adversary proceeding. *Hood*, 541 U.S. at 449-51.

The burden of proving undue hardship rests on the debtor. E.g., *Rifino* v. *United States* (*In re Rifino*), 245 F.3d 1083, 1087-88 (9th Cir. 2001). To determine if excepting student loan debt from discharge will impose an undue hardship, most circuits apply the three-part test first enunciated in *In re Brunner*, 831 F.2d 395, 396 (2d Cir. 1987), and adopted by the Ninth Circuit in *United Student Aid Funds, Inc.* v. *Pena* (*In re Pena*), 155 F.3d 1108, 1112 (9th Cir. 1998). 4 COLLIER'S ¶ 523.14[2], p. 523-102 n.4.[4]

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[4] Under the *Brunner* test, the debtor must prove that (1) he cannot maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents if required to repay the loans; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period; and (3) the debtor has made good faith efforts to repay the loan. Thus, the barriers to discharge of student loan debt are high, no doubt explaining why some debtors attempt to discharge student loan debt by declaration. 831 F.2d at 396.

A. By Express Statutory Restriction, Only Plans That Comply with the Bankruptcy Code May Be Approved.

Congress has twice acted to limit the permissible scope of Chapter 13 plans to those that comply with the Bankruptcy Code: First, it has done so by restricting the content of plans, and second, in a belt and suspenders approach, by also restricting the confirmation of plans.

Title 11, section 1322 first specifies the provisions that a plan "shall" include (§ 1322(a)) and then enumerates the additional provisions that a plan "may" include (§ 1322(b)). Nowhere on that comprehensive list is any provision allowing for the discharge of nondischargeable debts.

To be sure, section 1322(b)(11) allows additional provisions, but *only* if they are both (1) "appropriate" and (2) "not inconsistent" with the Bankruptcy Code – neither of which is even arguably satisfied by a declaration of discharge contrary to the plain text of section 523(a)(8).

For that reason, the Third Circuit has held that Congress did not intend for section 1322(b)(11) to permit the use of a Chapter 13 plan provision to avoid an otherwise-mandatory adversary proceeding. *In re McKay*, 732 F.2d 44 (3d Cir. 1984). There, the debtor sought to avoid a lien by simply providing so in his plan – although the procedure required to "determine the validity, priority, or extent of a lien" was, at that

time, an adversary proceeding under then Rule 701. *Id.* at 47-48. The creditor did not object to the plan, and the bankruptcy court approved it. The Third Circuit reversed, holding that the adversary proceeding requirement was not overridden by the more general provision of what was then section 1322(b)(10) and is now section 1322(b)(11):[5]

> Congress did not intend in section 1322(b)(10) to give the bankruptcy court carte blanche to establish procedures it deems fair without regard to other provisions of the Code. Although it is true that [former] section 405(d) of the Bankruptcy Code does permit its general directive to be overridden by specific laws to the contrary, we do not believe that a substantive catch-all provision such as section 1322(b)(10) contains the requisite specificity or force to suggest that Congress intended it to override the procedural rules adopted by section 405(d).

732 F.2d at 48 (footnote omitted); accord *In re Mansaray-Ruffin*, 530 F.3d 230, 236 (3d Cir. 2008) (noting that section 1322(b)(11) "does not leave courts free to disregard the Rules" requiring an adversary proceeding). That conclusion was compelled by basic principles of statutory construction, to wit, that a statute should be construed so that effect is given to all its provisions, and so that no part will be rendered

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[5] Redesignated by Pub. L. No. 109-8 (2005).

inoperative, superfluous, void, or insignificant. E.g., *Corley* v. *United States*, 129 S. Ct. 1558, 1566 (2009).

But Congress did not simply limit the content of plans in section 1322. In an abundance of caution, Congress also constrained the confirmation of plans. Thus, the very first requirement for a bankruptcy court to be able to confirm a plan is that the plan must "compl[y] with the provisions of this chapter and with the other applicable provisions of this title." 11 U.S.C. § 1325(a).

This Court has long recognized that the conditions listed in § 1325(a) are mandatory. "To qualify for confirmation under Chapter 13, the [debtors'] plan had to satisfy the requirements set forth in § 1325(a) of the Code." *Associates Commercial Corp.* v. *Rash*, 520 U.S. 953, 956 (1997). "A bankruptcy court is authorized to confirm a plan *only* if the court finds [that the conditions of § 1325(a) have been met]." *Johnson* v. *Home State Bank*, 501 U.S. 78, 87-88 (1991) (emphasis added). Were it otherwise, "a bankruptcy court would have the discretion to confirm a plan even if it were proposed in bad faith or by illegal means." *Wachovia Dealer Services* v. *Jones* (*In re Jones*), 530 F.3d 1284, 1290 (10th Cir. 2008). That is not the law.

The rule of statutory construction that statutes should be construed to be in harmony with each other, *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994), also points to the conclusion that the conditions to plan content and confirmation

are mandatory. As the Tenth Circuit has observed, a reading of the statute that "fails to recognize the mandatory nature of § 1325(a) would be in conflict with § 1329, the section governing modification of a plan after confirmation." *In re Jones*, 530 F.3d at 1290. To hold that the conditions set forth in § 1325(a) are not requirements for confirmation would "clearly 'violate[ ] the general maxim that the Bankruptcy Code and Rules be construed so that their provisions are harmonious with each other.'" *Ibid.* (citation omitted).

A plan proposing to discharge a debt that is automatically excepted from discharge does not comply with the Code. Therefore, such a plan does not satisfy the first condition of § 1325(a) and cannot be confirmed, just as a plan that proposes to pay a claim that is not allowable under the Code cannot be confirmed. See, e.g., *In re Robinson*, 225 B.R. 228, 234 (Bankr. N.D. Okla. 1998) ("A plan which proposes to pay a disallowed claim does not comply with the operative provisions of the Bankruptcy Code and may not be confirmed.").

Thus, by statute, the bankruptcy court has an "independent duty to confirm only those Chapter 13 plans which comply with all the provisions of Chapter 13 (see 11 U.S.C. § 1325(a)(1))." *In re Fizer*, 1 B.R. 400 (Bankr. S.D. Ohio 1979). The Ninth Circuit's remarkable conclusion that bankruptcy courts "have no business standing in the way" (Pet. App. 26) of illegal plan provisions is thus contrary to the text, purpose, and structure of the Code.

B. Orders That Purport To Discharge Student Loan Debt Without a Finding of Undue Hardship in an Adversary Proceeding Are Void to the Extent of Noncompliance.

It has long been established that a judgment is void for purposes of Rule 60(b)(4) if the court, although having jurisdiction over the parties and the subject matter, enters a decree "not within the powers granted to it by the law." *United States ex rel. Wilson* v. *Walker*, 109 U.S. 258, 266 (1883). "If [courts] act beyond [their] authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal." *Vallely* v. *Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 353-54 (1920) (citations omitted); *Wilcox* v. *Jackson*, 38 U.S. 498, 511 (1839).

Because bankruptcy courts are prohibited by section 523(a)(8) from discharging a student loan without first determining the existence of undue hardship, and by section 1325(a)(1) from confirming any plan that does not comply with the Bankruptcy Code, they are without authority to confirm a plan for discharge of a student loan and order a discharge without any adjudication of undue hardship. The confirmation order and the subsequent discharge order are thus void to that extent.

Every court of appeals that has considered the issue has reached that conclusion, except for the

Ninth Circuit. *In re Mersmann*, 505 F.3d at 1049 ("[A] bankruptcy court lacks authority to confirm a plan provision that seeks to discharge a student loan debt without an adversary proceeding proving 'undue hardship.'"); *Whelton* v. *Educational Credit Mgmt. Corp.*, 432 F.3d 150, 154 (2d Cir. 2005) ("A discharge obtained in this manner, *i.e.*, 'without filing an adversary proceeding to establish undue hardship,' is plainly 'contrary to the express language of the Bankruptcy Code and Rules.' Thus, it is properly treated as 'void.'") (quoting *In re Hanson*, 397 F.3d at 482 (internal citations omitted)); *In re Hanson*, 397 F.3d at 487 ("Due to the lack of compliance with the Bankruptcy Code and Rules, the bankruptcy discharge order was void and [the creditor] was properly granted relief pursuant to Rule 60(b)(4)."); *In re Escobedo*, 28 F.3d 34, 35 (7th Cir. 1994) (holding that a plan that did not comply with requirements of § 1322(a)(2) was "invalid" and the order confirming it was "nugatory").[6]

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[6] In an analogous context, the failure to adjudicate a predicate issue as required by statute was held to render the resulting order void. In *Great American Trading Corp.* v. *I.C.P. Cocoa, Inc.*, 629 F.2d 1282 (7th Cir. 1980), the threshold issue before the district court was whether the parties had agreed to arbitrate their contract dispute. When the making of an agreement to arbitrate is in issue, the Federal Arbitration Act requires the district court to proceed summarily to trial on that issue. Without doing so, the district court ordered arbitration. After judgment confirming the arbitration award was entered, defendant moved for relief under Rule 60(b) on the ground that the judgment was void because its due process right to a trial on the

(Continued on following page)

Here, the bankruptcy court failed to adjudicate the statutory requirement of undue hardship. Therefore, the confirmation and discharge orders are void to the extent that they purport to discharge Espinosa's student loans.

C. Failure To Object To a Plan Does Not Nullify the Self-Executing Nature of Exceptions from Discharge.

Because the exception of student loans from discharge in bankruptcy is "self-executing" – that is, "[u]nless the debtor affirmatively secures a hardship determination, the discharge order *will not* include a student loan debt," *Hood*, 541 U.S. at 450 (emphasis added) – a creditor has no duty to object to an illegal plan provision declaring a discharge of the non-dischargeable debt. Instead, the creditor is entitled to wait for the debtor to initiate the adversary proceeding required by the Bankruptcy Rules to secure an undue hardship determination as required by the Bankruptcy Code.

As discussed *supra* at pp. 27-30, compliance with the Bankruptcy Code is a mandatory condition to confirmation of a plan, and any attempt to discharge

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existence of an arbitration agreement had been denied. The district court denied the motion and the court of appeals reversed, concluding that "if no arbitration agreement exists the arbitration award and judgment entered thereon is void and [defendant's] motion for relief from that judgment should have been granted." 629 F.2d at 1288.

a student loan without a finding of undue hardship does not comply with section 523(a)(8). Therefore, the court cannot confirm such a noncompliant plan even if no creditor objects to it. Absent a duty to object, the failure to object cannot constitute a waiver of the express requirements of the Bankruptcy Code and Rules. The Third Circuit reached that conclusion in the context of a Chapter 13 debtor's attempt to invalidate a lien through a plan provision without initiating an adversary proceeding as required by Rule 7001(2). *In re Mansaray-Ruffin*, 530 F.3d at 237-38 (holding that creditor's "failure to object" to plan "did not do away with [the debtor's] duty to file a complaint and serve [the creditor] pursuant to Rules 7001, 7003, and 7004" and stating that the creditor "had the legal right to do nothing and insist upon being served with a summons and a complaint in order for its lien to be invalidated").

The Ninth Circuit's conclusion to the contrary rests on faulty assumptions about what creditors can glean from the debtors' filings for purposes of lodging an objection to a plan based upon the lack of undue hardship. See Pet. App. 9-10. Even assuming that the schedules to the debtor's petition demonstrate the first element of undue hardship – that "he cannot maintain, based on current income and expenses, a 'minimal' standard of living for himself and his dependents if required to repay the loans" – they do not evidence the second element, that "additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period." See n.4, *supra*. Similarly, the

limited information in a debtor's schedules is insufficient to enable the creditor to evaluate the third element – whether the debtor has made good faith efforts to repay the loans. Thus, a creditor would have no basis to "believe that the debtor would be able to make a convincing showing of undue hardship, and thus see no point in wasting the debtor's money, and its own, litigating the issue," or to "decide that a Chapter 13 plan presents the best chance of collecting most of the debt, rather than spending years trying to squeeze blood out of a turnip." See Pet. App. 9. The court of appeals' speculation excludes the more likely possibility, and the creditor's hope, that the debtor's education will produce greater earnings and thus an improved ability to pay in the future, especially when coupled with the debtor's forthcoming "fresh start."

The Ninth Circuit's supposition that a creditor would choose not to object to an invalid plan and instead "hope that the debtor will make some payments on the plan but ultimately fail to complete it, in which case the creditor will have collected a portion of the debt and still be free to collect the rest later," Pet. App. 9-10, is badly mistaken. There is no reason for a creditor to go along with a plan that proposes only partial payment of a student loan debt and discharge of the balance because the loan is nondischargeable and the student loan creditor has collection methods unavailable to most other creditors (for example, administrative wage garnishments, 20 U.S.C. § 1095a, interception of income tax refunds,

31 U.S.C. § 3720A, and offset of federal government benefits, 31 U.S.C. § 3716). Furthermore, there is no statute of limitations for the collection of student loans. 20 U.S.C. § 1091a.

There is no basis to assume that placing the burden on student loan creditors to object to plans, rather than (as the statute does) on debtors to prove undue hardship, would further any productive purpose. Indeed, forcing student loan creditors to spend time and money poring over plans that by law cannot properly effect a discharge of student loans makes little sense – particularly given that no one is better positioned than debtors themselves to know whether repayment would work an "undue hardship" on them.

D. Confirmation and Discharge Orders Entered with No Determination of Undue Hardship are Not *Res Judicata* as to the Student Loan Creditor.

Although *res judicata* bars a collateral attack on a final judgment, it does not bar a direct attack on a void judgment. *Pepper* v. *Litton*, 308 U.S. 295, 302 (1939); see also 18 MOORE'S FEDERAL PRACTICE § 131.02[1][a]. A Rule 60(b)(4) motion, such as the one made by USA Funds here, is a "direct attack" for *res judicata* purposes. *Ibid.* Furthermore, "there is no time limit on an attack on a judgment as void * * * * A void judgment cannot acquire validity because of laches." 11 CHARLES ALAN WRIGHT, ET AL., FEDERAL

PRACTICE AND PROCEDURE § 2862 (2d ed. 1995). Under those longstanding principles, confirmed plans and orders that propose to discharge student loan debt cannot be *res judicata* without a finding of undue hardship as the statute mandates.

1. The elements of *res judicata* are not satisfied.

For *res judicata* to apply, (1) the prior suit must have ended with a judgment on the merits; (2) the parties must be identical or in privity; (3) the suit must be based on the same cause of action; and (4) the party must have had a full and fair opportunity to litigate the claim in the prior suit. *Montana* v. *United States*, 440 U.S. 147, 153 (1979). At least two of those requirements are not fulfilled when a Chapter 13 plan proposes to discharge a student loan debt by mere declaration.

First, discharge of student loan debt without a determination of undue hardship is not an adjudication on the merits – which this Court has called the "most essential element of *res judicata*." *Cumberland Glass Mfg. Co.* v. *DeWitt*, 237 U.S. 447, 458 (1915). The exception to discharge of student loan debt is self-executing, and a debtor who wishes to defeat the statutory presumption against discharge must commence an adversary proceeding and secure a judicial determination of undue hardship. *Hood*, 541 U.S. at 449-51. It necessarily follows that a discharge

obtained by confirmation of a plan merely declaring a discharge is not an adjudication on the merits.

For nearly two decades, courts have recognized that "confirmation of a Chapter 13 plan is *res judicata* only as to issues that can be raised in the less formal procedure for contested matters." *Cen-Pen Corp.* v. *Hanson*, 58 F.3d 89, 93 (4th Cir. 1995) (citing *In re Beard*, 112 B.R. 951, 955-56 (Bankr. N.D. Ind. 1990)). "In other words, '[i]f an issue must be raised through an adversary proceeding it is not part of the confirmation process and, unless it is actually litigated, confirmation will not have a preclusive effect * * * * *'" *Ibid.* (quoting *In re Beard*, 112 B.R. at 956); *In re Mersmann*, 505 F.3d at 1050 ("[I]f an issue must be raised through an adversary proceeding it will not have a preclusive effect unless it is actually litigated."); *Whelton*, 432 F.3d at 154 (same); *In re Enewally*, 368 F.3d 1165, 1173 (9th Cir. 2004) ("Although confirmed plans are *res judicata* to issues therein, the confirmed plan has no preclusive effect on issues that must be brought by an adversary proceeding, or were not sufficiently evidenced in a plan to provide adequate notice to the creditor."); *In re Escobedo*, 28 F.3d at 35 ("The [p]lan was invalid for failing to include the mandatory provisions of § 1322(a)(2), and has no *res judicata* effect.").

Second, discharge by declaration does not provide a full and fair opportunity to litigate the issue of undue hardship on the merits – a key element of *res judicata*. *Montana* v. *United States*, *supra*. Whether a party received adequate notice is crucial to whether

that party had a full and fair opportunity to litigate the claim for *res judicata* purposes. Although a bankruptcy court confirmation order is usually *res judicata*, it is not entitled to such deference unless it was preceded by adequate notice. See, e.g., *Piedmont Trust Bank* v. *Linkous* (*In re Linkous*), 990 F.2d 160, 162 (4th Cir. 1993) ("[W]e cannot accord the bankruptcy court's order the finality which would attach if the notice given to [the creditor] was adequate.").

In this case, there is a marked difference between the level of notice provided to creditors in the adversary proceeding required by the Bankruptcy Rules, and that provided if a debtor is permitted to substitute discharge by declaration for the adversary proceeding. With the latter, the level of notice is much lower than that required for an adversary proceeding. Notice of a plan (in no particular format) need only be sent by mail to creditors at the addresses provided by the debtor on his or her list of creditors. FED. R. BANKR. P. 2002(g)(2). In contrast, adversary proceedings come to the lender's door by service of a summons and complaint. FED. R. BANKR. P. 7003, 7004. Because student loan guarantors like USA Funds receive "tidal waves of mail," *Ruehle* v. *Educational Credit Mgmt. Corp.* (*In re Ruehle*), 412 F.3d 679, 684 (6th Cir. 2005), using a plan as a vehicle to communicate an attempt to discharge a nondischargeable debt is not "reasonably calculated" to give adequate notice. As the Sixth Circuit has observed:

> The quantity of "notice" that is issued by the bankruptcy system is so overwhelming that

> it is necessary to have clear rules in order for creditors to know what notices to notice as opposed to the notices that are deafening legal background noise. The Code and the Rules set forth those clear standards and it is up to the courts to ensure that the lines are not blurred.

In re Ruehle, 412 F.3d at 684. Because the "clear standards" established by the Bankruptcy Rules to ensure that notice is adequate for adversary proceedings are not satisfied where discharge by declaration is substituted by the debtor, plan confirmation and discharge orders entered under those circumstances are not *res judicata*.

2. The Bankruptcy Code's general finality provision does not apply to plan provisions that are contrary to law.

Although generally "[t]he provisions of a confirmed plan bind the debtor and each creditor, * * * whether or not such creditor has objected to * * * the plan," 11 U.S.C. § 1327(a), a confirmation order does not have that effect when the plan does not comply with other provisions of the Bankruptcy Code or a creditor is denied due process. The confirmation and discharge orders here, obtained as they were without proof of undue hardship in an adversary proceeding and without proper notice to USA Funds, do not have preclusive effect. See, e.g., *In re Ruehle*, 412 F.3d at 684 (rejecting the argument that such orders have

preclusive effect because doing "it ignores the clear intent of Congress and the Judicial Conference" to require proof of undue hardship through an adversary proceeding); *In re Mersmann*, 505 F.3d at 1047 ("Discharge-by-declaration deserves no preclusive effect under § 1327(a) because it fails to comport with the provisions of the Bankruptcy Code and Rules governing discharge."); *Whelton*, 432 F.3d at 154 (same); see also *In re Mansaray-Ruffin*, 530 F.3d at 238-39 (plan confirmation order was not final where adversary proceeding was mandatory to invalidate lien).

Any other conclusion would put two statutes in needless conflict and render one of them partially ineffective – thereby violating the familiar canons of construction that where general and specific statutes seemingly conflict, the specific provision governs the general, see *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992), and that statutes should be interpreted where possible to give meaning to all their terms. *Corley*, 129 S. Ct. at 1566. Specifically, applying section 1327(a) to give finality to a confirmation order that includes an invalid discharge by declaration conflicts with section 1328(a), which provides for discharge of all debts upon completion of the debtor's plan, except, *inter alia*, student loans. Thus, "[g]iving preclusive effect to a discharge-by-declaration through § 1327(a) renders part of § 1328(a)(2) nugatory." *In re Mersmann*, 505 F.3d at 1048. Because discharge by declaration violates the plain text of the Bankruptcy Code, the statutes should be harmonized by allowing section 1328(a)'s

specific exception to discharge to limit section 1327(a)'s general effect.[7] *Ibid.*

Nor can an order bar a challenge to the discharge of student loan debt where, as here, the order specifically excepts the debt from discharge. J.A. 46. Although the bankruptcy court, on remand, ruled that the exclusion of USA Funds' student loan debt from the discharge order was a clerical error, the materially amended discharge order does not relate back to operate retroactively. *Federal Trade Comm'n* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952). For that reason, too, USA Funds' challenge to the discharge of Espinosa's student loan debt is not barred.

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[7] The finality of plan confirmation and discharge orders is not otherwise at issue where nondischargeable debts are involved. If an order purporting to discharge a nondischargeable debt is void as to that debt, there is no material consequence. The nondischargeable debt simply remains undischarged, leaving other creditors unaffected.

III. THERE ARE SOUND POLICY REASONS WHY CONGRESS REQUIRED AN ADVERSARY PROCEEDING TO ESTABLISH UNDUE HARDSHIP BEFORE STUDENT LOAN DEBT MAY BE DISCHARGED.

A. If the Ninth Circuit's Approach Were Adopted Nationwide, It Would Apply to All Statutory Exceptions to Discharge.

In addition to student loan debt, Congress has expressly excepted a litany of other debts from discharge in Chapter 13 bankruptcy cases: certain taxes and customs duties; debts incurred through falsity or fraud; debts not listed or scheduled in time to permit timely filing of a claim; debts arising from embezzlement or larceny; debts for death or personal injury caused willfully or maliciously or while operating a motor vehicle, vessel or aircraft while intoxicated by alcohol or drugs; domestic support obligations such as alimony and child support; and restitution and fines when included in a debtor's criminal sentence. Those exceptions to discharge are enumerated in multiple subparagraphs of section 523(a) and incorporated into section 1328(a) as well.[8]

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[8] Most of the exceptions to discharge in Chapter 13 cases are, like the student loan exception, self-executing. Not automatically excepted from discharge are, in general terms, debts for fraud, defalcation while acting as a fiduciary, embezzlement, and larceny as specified in § 523(a)(2) and (4). Section 1328(a) incorporates those categories of debt from § 523(a), and they are

(Continued on following page)

In approving discharge by declaration, the Ninth Circuit relied upon the following syllogism: (i) all creditors have an affirmative obligation to object to provisions of a plan that purport to discharge nondischargeable debts; (ii) if a creditor does not object, the bankruptcy court must confirm the plan; and (iii) once the plan is confirmed, it is binding in perpetuity, and all nondischargeable debts therein are deemed discharged, notwithstanding the plain text of the statute to the contrary. As demonstrated above, *supra*, pp. 23-42, each proposition of the court of appeals' syllogism is false and contrary to law.

But, even if the Ninth Circuit were correct in its reasoning, there is *not a word in its analysis that limits the logic to student loans*. By its terms, if any plan that purports to discharge a nondischargeable debt must be enforced in all subsequent proceedings, then every exception in section 523(a) would likewise be subject to discharge by declaration.

Thus, if approved by this Court, the tactic of discharge by declaration would necessarily spread to every other nondischargeable debt, such as taxes, spousal maintenance, child support, drunk driving personal injury and death judgments, and criminal

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therefore subject to the requirement of § 523(c)(1) that creditors who are owed such debts must initiate an adversary proceeding in the bankruptcy court to establish the nature of the debtor's conduct and seek a determination of dischargeability. If the creditor does not do so, the debt will be discharged. 4 COLLIER'S ¶ 523.26[1], p. 523-133.

fines and restitution. Indeed, if such an avenue were available to circumvent the Bankruptcy Code and Rules, zealous debtors' counsel would routinely include all such nondischargeable debts in every bankruptcy plan.

The Ninth Circuit has previously avoided addressing "the public policy concerns that might impact the dischargeability of such [other] obligations," *In re Pardee*, 193 F.3d at 1087, n.6, but the logic behind its rule does not permit them to be ignored. And there are compelling reasons not to allow discharge by declaration for the nondischargeable debts Congress enumerated in section 523(a).

In contrast to student loan cases, where the Ninth Circuit asserted that "[a]fter all, we aren't talking here about destitute widows and orphans, or people who don't speak English or can't afford a lawyer," Pet. App. 16-17, exactly such individuals will necessarily be affected if discharge by declaration is allowed to spread to the debts owed to them.

None of the assumptions made by the court of appeals in this case about the sophistication of student loan lenders and guarantors can be made about divorced spouses who are owed family support, or those injured by or surviving those killed by a drunk driver, or the victims of crimes, all of whom stand to lose what they are owed through an illegal discharge in bankruptcy. Such individuals, to borrow the court of appeals' phrases, are not creditors "whose business it is to administer [such debts]," Pet.

App. 26, or "sophisticated parties who have ample resources to protect their rights." Pet. App. 17. Therefore, "leaving it up to the creditor and his lawyers to figure out what objections or remedies are available," as the court of appeals would have it when a debtor proposes an over-reaching Chapter 13 plan, cannot be what Congress had in mind.

Even sophisticated creditors – such as government entities who are owed taxes, customs duties, criminal fines, and the like – should not be saddled with the additional burden of having to scrutinize every Chapter 13 plan they receive in search of discharge provisions that do not belong there. That is particularly so because debtors are best positioned to prove undue hardship. Given that, it is hardly unfair that debtors should bear the burden of giving proper notice in the manner required by law. And, of course, if a change in the law or procedural rules is warranted, it should be made by Congress or the Judicial Conference – not by judicial decisions effectively amending the Bankruptcy Code and Rules to allow discharge by declaration.

Promoting the expansion of discharge by declaration cannot be reconciled with the reasons Congress made certain debts nondischargeable in the first instance. For example, making it possible to discharge domestic support obligations would be inconsistent with the legislative goals of protecting spouses and children, and the public fisc from an increased welfare burden. *In re Sargis*, 197 B.R. 681, 687

(Bankr. D. Colo. 1996); *Matter of Bell*, 189 B.R. 543, 547 (Bankr. N.D. Ga. 1995); *In re Bishop*, 13 B.R. 304, 305 (Bankr. E.D.N.Y. 1981). Enabling the discharge of taxes would be contrary to maintaining government financing and preventing tax evasion. *Bruning* v. *United States*, 376 U.S. at 361. Permitting the discharge of criminal fines and restitution would offend the intention that discharge in bankruptcy not be a haven for wrongdoers. *Richmond* v. *New Hampshire Supreme Court Comm. on Prof'l Conduct*, 542 F.3d 913, 917 (1st Cir. 2008). Allowing the discharge of drunk driving tort debts would hardly deter drunk driving or protect the victims of drunk drivers. *In re Hudson*, 859 F.2d 1418, 1423 (9th Cir. 1988).

With respect to student loan debt, Congress has made the judgment that, absent undue hardship, creditors' interests in recovering full payment of student loan debts outweighs the debtors' interest in a completely fresh start. Discharge by declaration thwarts that judgment and reverses decades of legislative amendments all designed to make it more difficult – not easier – for student loan debt to be discharged in bankruptcy. And it does so without any significant, much less compelling, countervailing policy considerations.

B. Requiring Creditors To Raise *Pro Forma* Objections To Preserve the Statutory Exceptions Would Yield No Meaningful Benefits While Imposing Significant Dead-Weight Losses.

As a practical matter, shifting the burden of pleading to the creditor is not only contrary to the Bankruptcy Code and Rules, but senseless and wasteful of the parties', and especially the courts', limited resources.

USA Funds does not maintain that it would be impossible to object to every attempted discharge by declaration. With enough money, and hiring an armada of lawyers, that would surely be possible – for student loan providers and for many other creditors with nondischargeable debts under section 523(a). But it would be a waste of resources for all concerned, and would accomplish no meaningful benefit whatsoever.

Federal student loan programs involve more than 6,200 postsecondary institutions, 3,100 lenders, 35 guaranty agencies, and numerous third-party servicers. U.S. DEPT. OF EDUCATION, FINANCIAL AND PERFORMANCE QUARTERLY UPDATE, Issue 2008-2, at 7 (Sept. 30, 2008). During fiscal year 2008 alone, Federal Student Aid provided $96 billion in student loan awards and oversaw an outstanding loan portfolio of more than $500 billion. *Ibid.* In 2007-2008, students and their parents borrowed $86.7

billion in federal and private education loans,[9] and 54 percent of all full-time college students acquired student loans.[10]

At the same time, unfortunately, consumer bankruptcy filings are now on the rise, increasing by 31 percent in 2008 alone. ADMIN. OFFICE OF THE U.S. COURTS News Release, BANKRUPTCY FILINGS UP IN CALENDAR YEAR 2008 (Mar. 5, 2009).[11] Chapter 13 bankruptcy filings have increased substantially every year since 2006. *Ibid.* (citing statistics of 251,179 Chapter 13 filings in 2006, 324,771 in 2007, and 362,762 in 2008).

Although the precise number of Chapter 13 bankruptcies involving student loans is unknown, the potential is enormous given the ubiquity of student loans and the volume of Chapter 13 bankruptcies. Adopting the Ninth Circuit's rule would require student loan guarantors (like USA Funds), the Department of Education, and lenders to object in virtually every case.

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[9] TRENDS IN STUDENT AID 2008, COLLEGE BOARD, October 2008, http://professionals.collegeboard.com/profdownload/trends-in-student-aid-2008.pdf.

[10] HOW MUCH ARE COLLEGE STUDENTS BORROWING, COLLEGE BOARD POLICY BRIEF, August 2009, http:/professionals.collegeboard.com/profdownload/cb-policy-brief-college-stu-borrowing-Aug-2009.pdf.

[11] Available at www.uscourts.gov/Press_Releases/2009/BankruptcyFilingsDec2008.cfm.

The effect of the court of appeals' rule is to force such objections as a matter of course: "[i]f a debtor proposes to discharge a student loan debt without invoking the special procedures applicable to such debts, the creditor can object to the plan until the debtor shows undue hardship in an adversary proceeding." Pet. App. 9, 10, 14-15, 24 n.6. But, the court also acknowledged, once made, any such objection must necessarily be sustained: "Had [USA] Funds so objected, the bankruptcy court would have been *required* to disapprove the plan." *Id.* at 15 (emphasis added).

Given that every single objection to every plan that includes a discharge by declaration must be sustained, the predictable outcome of the Ninth Circuit's rule – if extended nationwide – would be (1) that debtors' counsel would routinely attempt to include nondischargeable debts in proposed plans, and (2) creditors currently protected by sections 523(a) and 1328(a) would be forced to hire the lawyers and expend the resources to scrutinize every such plan and to interpose objections to every attempted discharge by declaration. And when every objection was upheld, we would return to the *status quo ante* – that the only way to discharge student loan debts would be for the debtor to initiate an adversary proceeding and meet his or her burden of proof.

That makes no sense. It would mandate an enormous expenditure of resources – which, in the student loan context would necessarily either drive up costs to

student borrowers and to the taxpayers or reduce available loan funds – and an even bigger waste of time for the court system, all to accomplish nothing.

All of these dead-weight losses can be avoided, and the identical outcome can be achieved, simply by giving effect to the plain text of the Bankruptcy Code and Rules.

IV. DUE PROCESS REQUIRES THE HEIGHTENED NOTICE AFFORDED STUDENT LOAN CREDITORS IN ADVERSARY PROCEEDINGS.

The Court has recognized that an adversary proceeding to determine the dischargeability of a debt provides greater procedural protection to the creditor through personal notice:

> Creditors generally are not entitled to personal service before a bankruptcy court may discharge a debt. Because student loan debts are not automatically dischargeable, however, the Federal Rules of Bankruptcy Procedure provide creditors greater procedural protection. The current Bankruptcy Rules require the debtor to file an "adversary proceeding" * * * in order to discharge his student loan debt. The proceeding is considered part of the original bankruptcy case * * * * But, as prescribed by the Rules, an "adversary proceeding" requires the service of a summons and complaint.

Hood, 541 U.S. at 451-52 (internal citations omitted). Adversary proceedings are specific to the debtor and

the affected creditor. "The adversary proceeding is treated as a separate dispute between the Debtor and Creditor, subject to the procedural guidelines and safeguards contained in the Federal Rules of Civil Procedure." *Banks* v. *Sallie Mae Servicing Corp.* (*In re Banks*), 299 F.3d 296, 301 (4th Cir. 2002). It is an "individualized determination." *Hood*, 541 U.S. at 450.

The adversary proceeding is prescribed by the Bankruptcy Rules, which in turn are promulgated under 28 U.S.C. § 2075. Such proceedings are modeled on the traditional civil litigation format, either incorporating or adapting most of the Federal Rules of Civil Procedure. FED. R. BANKR. P. 7001, Advisory Committee Notes. Accordingly, an adversary proceeding is commenced by the filing of a complaint. FED. R. BANKR. P. 7003 (incorporating FED. R. CIV. P. 3). The complaint must then be served with a summons. FED. R. BANKR. P. 7004. Service upon a corporation, such as USA Funds, must be made upon "an officer, a managing or general agent, or to any agent authorized by appointment or by law to receive service of process." FED. R. BANKR. P. 7004(b)(3). Thus, an adversary proceeding requires a "heightened degree of notice." *In re Banks*, 299 F.3d at 303, n.4; *In re Hanson*, 397 F.3d at 487 (same).

In contrast, notice of the hearing on confirmation of a Chapter 13 plan need only include a summary of the plan, not the actual plan. FED. R. BANKR. P. Rule 3015(d). And notice need only be sent by mail to creditors at the addresses provided by the debtor on

his or her list of creditors. FED. R. BANKR. P. 2002(g)(2). Notice of a proposed plan thus does not require specific notice of the effect of the plan on each creditor, and it does not require notice to be served on a person at any particular level of responsibility. The notice requirements to initiate an adversary proceeding are thus far more exacting than the notice required for confirmation of a Chapter 13 plan. *Hood*, 541 U.S. at 451-52; *In re Mersmann*, 505 F.3d at 1043; *In re Ruehle*, 412 F.3d at 684-85; *In re Banks*, 299 F.3d at 301.

Espinosa's plan – which made no mention of undue hardship or its requisite elements and thus was not even the "functional equivalent" of a complaint[12] – was merely mailed to USA Funds at the post office box address at which it received loan payments. Although USA Funds received such minimal notice of Espinosa's plan, it was not given the notice and opportunity to be heard that Congress has prescribed to be due.

The Due Process Clauses of the Fifth and Fourteenth Amendments have long been held to require both substantive and procedural due process.

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[12] A complaint in an adversary proceeding must comply with Federal Rule of Civil Procedure 8(a). It must "show[ ] that the [debtor] is entitled to relief" and demand the relief sought. Rule 7008 (incorporating Federal Rule of Civil Procedure 8). A complaint seeking to discharge a student loan must therefore allege facts satisfying the requisite elements of undue hardship and pray for a discharge of the loan.

E.g., *Harrah Ind. Sch. Dist.* v. *Martin*, 440 U.S. 194, 196 (1979). Procedural due process – at issue here – can be further bifurcated, demanding (1) the constitutional minima of process (typically notice and opportunity to be heard) before a deprivation of property, and (2) compliance with whatever process Congress has determined is due in the particular proceeding at issue.

It is this second aspect of procedural due process that is implicated in the case at bar. USA Funds' argument is not predicated on the constitutional minima; USA Funds does not contend that, if Congress chose to allow discharge by declaration, the Constitution would forbid it.

But, Congress has not done so. Instead, the Bankruptcy Code and Rules establish heightened procedural protections for the discharge of student loan debts, and due process requires that those protections be given full force. See generally *City of New York* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 293 (1953) (discussed in detail below).

The Court has held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950) (citations omitted).

Congress has prescribed in the Bankruptcy Code the level of notice that is due:

> In this title – "after notice and a hearing," or a similar phrase – means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances * * * *

11 U.S.C. § 102(1)(A). That standard applies to plan confirmation hearings by virtue of the language of the confirmation hearing statute, section 1324: "After notice, the court shall hold a hearing on confirmation of the plan." See also 2 COLLIER'S ¶ 102.02[3], p. 102-6 n.14.

"The determination of what is 'appropriate' in the circumstances may be aided by reference to the Federal Rules of Bankruptcy Procedure." 2 COLLIER'S ¶ 102.02[1], p. 102-4. Thus, the appropriate notice in any proceeding to discharge a student loan is that which is required by the Bankruptcy Rules in an adversary proceeding to determine the dischargeability of a debt. *In re Mansaray-Ruffin*, 530 F.3d at 242 ("[D]etermination regarding the process due in any particular case depends on the context. A crucial piece of the context here is the existence of a binding Federal Rule of Bankruptcy Procedure directly on point that makes clear that a lien may only be invalidated through an adversary proceeding.").

If such notice is more than would be required absent section 102(1)(A), the higher statutory

standard must nevertheless be satisfied. See *Hood*, 541 U.S. at 451-52; *Mullane*, 339 U.S. at 314. Espinosa's failure to satisfy the heightened notice standard deprived USA Funds of the notice deemed appropriate by Congress and the Bankruptcy Rules and constitutes a denial of due process that voids the confirmation and discharge orders. "[W]hen notice is a person's due, process which is a mere gesture is not due process." *Id.* at 315.

That USA Funds had knowledge of Espinosa's bankruptcy and received his proposed plan containing the discharge by declaration provision does not alter that conclusion. As this Court has explained, "even creditors who have knowledge of a reorganization have a *right* to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred." *City of New York*, 344 U.S. at 297 (emphasis added). In that case, the City had improvement liens on the debtor railroad's real estate. *Id.* at 294. Pursuant to the Bankruptcy Act, the court issued an order giving creditors a deadline to file claims, after which deadline any unfiled claims would be denied participation. *Ibid.* Although the Act provided that "[t]he judge shall require [debtors] to file in the court a list of all known creditors," that was not done. *Id.* at 296. The Act further provided that "[t]he judge shall cause reasonable notice of the period in which claims may be filed, * * * by publication or otherwise." *Ibid.*

The judge required the railroad to give notice by mail to specific creditors and all others who had

appeared in court, and to publish the notice. *Id.* at 294. Although the City's liens were known to the railroad, the City did not receive notice by mail. *Id.* at 294, 296. The City did not file a claim, *id.* at 294, and therefore the court ruled the City's liens were unenforceable, *id.* at 295. This Court rejected the argument that the City's knowledge of the bankruptcy trumped the requirement to give notice as required by law, stating:

> [E]ven creditors who have knowledge of a reorganization *have a right to assume that the statutory "reasonable notice" will be given* them before their claims are forever barred. When the judge ordered notice by mail to be given the appearing creditors, New York City acted reasonably in waiting to receive the same treatment.
>
> The statutory command for notice embodies a basic principal of justice – that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights * * * *

Id. at 297 (emphasis added).

Similarly, USA Funds was entitled to expect notice by service of a summons and complaint in an adversary proceeding to determine undue hardship. "[W]here an adversary proceeding is required to resolve the disputed rights of the parties, the potential defendant has the right to expect that the proper procedures will be followed." *In re Banks*, 299 F.3d at 302 (citation and internal quotation omitted);

accord *In re Mansaray-Ruffin*, 530 F.3d at 239-40; *In re Mersmann*, 505 F.3d at 1049; *In re Ruehle*, 412 F.3d at 684-85. Anything less is "winking at due process, which is the cornerstone of justice." *Id.* at 684.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded with instructions to affirm the judgment of the district court.

Respectfully submitted,

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STATUTES INVOLVED

11 U.S.C. § 102. Rules of construction.

In this title –

(1) "after notice and a hearing", or a similar phrase –

(A) means after such notice as is appropriate in the particular circumstances, and after opportunity for a hearing as is appropriate in the particular circumstances * * *

11 U.S.C. § 523. Exceptions to discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

(1) for a tax or a customs duty * * *

* * * *

(5) for a domestic support obligation;

* * * *

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for –

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in

whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

* * * *

11 U.S.C. § 1322. Contents of plan.

(b) Subject to subsections (a) and (c) of this section, the plan may –

* * * *

(11) include any other appropriate provision not inconsistent with this title.

* * * *

11 U.S.C. § 1325. Confirmation of plan.

(a) [T]he court shall approve a plan if –

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

* * * *

11 U.S.C. § 1327. Effect of confirmation.

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

11 U.S.C. § 1328. Discharge.

(a) As soon as practicable after completion by the debtor of all payments under the plan, * * * the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt –

(1) provided for under section 1322(b)(5);

(2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a);

(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime; or

(4) for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual.